Supreme Court, U.S.
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No. 09-790

# In the Supreme Court of the United States

EDMUND ZAGORSKI,

*Petitioner,*

v

RICKY BELL, WARDEN,

*Respondent*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR REHEARING

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## PETITION FOR REHEARING

In dissent in the intervening decision in *Renico* v *Lett*, No 09-338 (May 3, 2010), Justice Stevens recognized that, at common law and afterwards, trial judges used varied forms of physical duress to coerce jurors to reach unanimous verdicts, ranging from "bouncing" jurors in oxcarts to depriving jurors of heat, sleep, or sustenance *Id* , slip op at 1-2 (Stevens, J , dissenting) "Mercifully * * * such harsh measures are no longer tolerated " *Id* at 2

Justice Stevens' dissent in *Renico* confirms that petitioner Edmund Zagorski's custodial statements were indeed coerced and involuntary, because Zagorski was subjected to even worse physical and mental torment here During the heat of the summer (and in violation of a federal court order), Zagorski was placed in solitary confinement in a windowless sweatbox He quickly became mentally ill, lost thirty pounds, tried to commit suicide, and then said he would confess if he could end his misery by picking the date and time of his execution The lower courts, however, have placed their imprimatur on such cruelty, claiming that Zagorski's statements following such inhumane treatment are constitutional Every thing this Court has ever said on the subject says otherwise "A confession by which life becomes forfeit must be the expression of free choice " *Payne* v *Arkansas*, 356 U S 560, 567 (1958) (quotation marks and citation omitted) Zagorski's statements were not the product of a free choice by any measure They were coerced

While Justice Stevens' *Renico* opinion confirms the involuntariness of Zagorski's statements, so too does the Ninth Circuit's recent decision in *Doody* v

*Schriro*, 596 F 3d 620 (9th Cir 2010), where the Ninth Circuit held that Doody's custodial statement was involuntary Acknowledging this Court's precedents, the Court held that a statement must derive from "an essentially free and unconstrained choice by its maker" (*id* at 638, quoting *Schneckloth* v *Bustamonte*, 412 U S 218, 225-226 (1973)), acknowledged that no individual may be "subjected to a physical or a mental ordeal" leading to a confession (*id* at 638, quoting *Watts* v *Indiana*, 338 U S 49, 53-54 (1949)), and noted that the voluntariness of any statement must be assessed by "weighing of the circumstances of pressure against the power of resistance of the person confessing" *Id* at 645, quoting *Dickerson* v *United States*, 530 U S 428, 434 (2000) Applying these principles, the Court concluded that because Doody was a "sleep-deprived and unresponsive" juvenile questioned repeatedly for thirteen hours, the only "intellectual honest" and reasonable conclusion was that his confession was involuntary *Doody*, 596 F 3d at 644, 639

Zagorski's statements to the authorities bear the identical marks of involuntariness identified in *Doody* Zagorski was subjected to the very sort of "physical [and] mental ordeal" proscribed by Doody As in *Doody*, the only intellectually honest conclusion here is that the mentally ill and suicidal Zagorski made no "free and unconstrained choice" (*id* at 638) to confess, where he was subjected to torturous conditions of confinement And, as in *Doody*, admission of Zagorski's statements was not harmless, where Zagorski's statements (like Doody's) "were integral to the prosecution's case" and the prosecution relied upon them in closing argument *Id* at 652, 653 Just as Doody's statements have been declared involuntary and prejudicial, so too must Zagorski's The

Sixth Circuit's decision comes in direct conflict with *Doody*

Justice Stevens' opinion in *Renico* and the recent decision in *Doody*, therefore, make clear that Edmund Zagorski's custodial statements were, indeed, involuntary They were unquestionably the product of untold physical and mental anguish This Court should thus grant rehearing and grant his petition for writ of certiorari, for these and all the reasons stated in his petition—especially where it clearly appears that the Sixth Circuit's decision conflicts with *Doody* and flies in the face of the longtime prohibition (recognized by Justice Stevens) against using physical privation or cruelty to force an individual to act Where that principle has been flouted in a capital case, as here, this Court has an even greater duty to act Rehearing should be granted

## CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted

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## COUNSEL'S CERTIFICATION OF COMPLIANCE WITH RULE 44.1

I, Paul R Bottei, am counsel for petitioner in the above-captioned action and a member of the Bar of this Court Pursuant to this Court's Rule 44 1, I hereby certify that the Petition for Rehearing submitted herewith is presented in good faith and not for delay

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